

March 15, 2021

Mr. Michael Snyder  
Environmental Resource Specialist, PMP-R  
U.S. Army Corps of Engineers - Kansas City District  
601 E. 12th St.  
Kansas City, MO 64106

**DRAFT Clean Water Act Section 401 Water Quality Certification**

RE: **PN: #2020-001.** Repair of Missouri River Recovery Program (MRRP) I. E. United States Army Corps of Engineers (USACE) built riparian chutes.

Mr. Snyder:

On May 3, 2020, the Kansas Department of Health and Environment (KDHE) received from the USACE in accordance with 40 CFR 121 et. seq., a request for Section 401 Water Quality Certification for the proposed Section 404 project as described below.

**Description from the U.S. Army Corps of Engineers Kansas City District Public Notice dated May 12, 2020: "Description:** The U.S. Army Corps of Engineers, Kansas City District (USACE), has prepared a Draft Environmental Assessment (EA) and associated Finding of No Significant Impact (FONSI) in accordance with the National Environmental Policy Act (NEPA) of 1968, as amended, for the proposed repair and modification of Missouri River Recovery Program (MRRP) chutes for damages resulting from the 2019 flood. The Draft EA was prepared to assess and document potential effects to the human and natural environment of the project's Proposed Action. The USACE has made a preliminary determination that the Proposed Action would not result in significant degradation to the environment and therefore supports preparation of a Draft FONSI. The Draft EA, FONSI, and supporting information are provided with issuance of this Public Notice on 12 May 2020 to initiate the 30-day public review and comment period.

**PROJECT LOCATION** The Proposed Action includes project at multiple locations along the lower Missouri River. Work is anticipated at eight chutes including in Dalbey Bottoms and Benedictine Bottoms, in Kansas.

**AQUATIC HABITAT:** The project features will take place within the side channel chutes on the Missouri River. As described in the Draft Environmental Assessment, the quality of aquatic habitat in the chutes is anticipated to improve as a result of the Proposed Action.

**APPLICANT'S STATEMENT OF AVOIDANCE, MINIMIZATION, AND COMPENSATORY MITIGATION FOR UNAVOIDABLE IMPACTS TO AQUATIC RESOURCES:** No mitigation is proposed by the applicant as the project is designed restore habitat (Corps built riparian chutes) for certain fish species in the Missouri River in coordination with the U.S. Fish and Wildlife Service."

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KDHE has reviewed the project application material and determined the project has the following water pollutant discharge sources:

1. Construction activities including excavating and filling, equipment and materials storage, equipment fueling and maintenance, etc.
2. Riparian disturbance and straightening channel

Discharges from these sources if not minimized or otherwise controlled may cause violations of the provisions of the Kansas Surface Water Quality Standards (KSWQS) found at KAR 28-16-28 et seq. As referenced on page 1 the project will impact the Missouri River **described** in the Kansas Surface Water Register (KSWR). The activity has potential to impair the Missouri River's designated uses as follows: **Special aquatic life support**, primary contact recreation stream segment is by law or written permission of the landowner **open** to and accessible by the public, food procurement, irrigation, industrial and domestic supply, groundwater recharge, and livestock watering.

As noted above, the Missouri River has a special aquatic life use (SALU) designation. Waters designated as SALU contain designated critical habitat for threatened or endangered species, known populations of threatened or endangered species or uncommon combinations of plants and animals as documented in K.A.R. 28-16-28d(b)(2)(A). Additionally, K.A.R. 28-16-28c(a)(4) states: "No degradation of surface water quality by artificial sources of pollution shall be allowed if the degradation will result in harmful effects on populations of any threatened or endangered species of aquatic or semiaquatic life or terrestrial wildlife or its critical habitat as determined by the secretary of wildlife and parks pursuant to K.S.A. 32-960, and amendments thereto, and K.A.R. 115-15-3 or in the federal endangered species act, 16 U.S.C. 1532 , as amended on October 7, 1988." At a minimum, pursuant to K.A.R. 28-16-28c(a)(1)(A); levels of water quality in surface waters of the state shall be maintained to protect the existing uses of those surface waters."

As stated above the Missouri River requires a higher level of water quality protection. Therefore, a Stormwater Pollution Prevention Plan, per Conditions 4. and 8. of this certification, shall be emailed to the address below:

Scott L. Satterthwaite  
Scott.Satterthwaite@ks.gov  
Kansas Department of Health and Environment  
Bureau of Environmental Field Services  
Watershed Management Section

Please note the Kansas Surface Water Quality Standard citations and location are subject to change without notice. For the most recent version, please see: <https://www.kdheks.gov/tmdl/kswqs.htm>.

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The KDHE has determined the project will avoid KS WQS violations and thus conditionally certifies it as the applicant adheres to the following:

- 1) **This certification shall be posted on site through the duration of the project.**
- 2) **KDHE Notification:** Permit recipients shall email KDHE at [KDHE.NPS@ks.gov](mailto:KDHE.NPS@ks.gov) when construction starts.
- 3) Pursuant to Kansas Statute Annotated (K.S.A.) 65: 164 and 165, U.S. Army Corps of Engineers - Kansas City District Civil Works (USACE KCD CW) shall prepare a written project water quality protection plan (PWQPP) describing the actions that will be taken to comply with certification conditions 4-10 below. This condition may be waived depending on the content of the “stormwater pollution prevention plan” prepared pursuant to Item A under **“Other Considerations (Not 401 Conditions) for Maintaining and Restoring Water Quality in KS”**. Additionally, KDHE strongly suggests that the stormwater pollution prevention plan’s description of BMPs, include measures in the bold, small roman numerals, after each “alphabet item” under pollutant cause, to further protect the Missouri River.
- 4) Pursuant to K.S.A. 65: 164 and 165, USACE KCD CW shall avoid or control the discharge of suspended solids from the proposed activities **so that the project does not cause:**
  - a. Any surface waters of the state within and below the project area to have a public health hazard, nuisance condition or impairments of designed uses [KAR 28-16-28e(b)(1)].
  - b. Any surface waters of the state within and below the project area to contain discarded solid material, including trash, garbage rubbish, offal, grass clippings, discarded building or construction materials, car bodies, tires, wire and other unwanted or discarded materials [KAR 28-16-28e(b)(3)].
  - c. Addition of suspended solids to the Missouri River in amounts and concentrations that will interfere with the behavior, reproduction, physical habitat, or other factors related to the survival and propagation of aquatic or semiaquatic life or terrestrial wildlife [KAR 28-16-28e(d)(2)(B)].
  - d. The Missouri River project site to be impacted resulting in additional sediment and associated nutrients to the river [KAR 28-16-28e(d)(2)(B)].
- 5) Pursuant to K.S.A. 65: 164 and 165, USACE KCD CW shall avoid or control the discharge of floatable materials, toxic substances, oil and grease and other fluids from improper storage of chemicals, heavy equipment staging and use leaks or spills **so that the project does not cause:**
  - a. Any surface waters of the state within and below the project area to have a public health hazard, nuisance condition or impairments of designed uses [KAR 28-16-28e(b)(1)].

- b. Any surface waters of the state within and below the project area to have a visible oil and grease film or sheen on the water surface or on submerged substrate or adjoining shore lines, nor have a sludge or emulsion deposit below the water surface of adjoining shorelines [KAR 28-16-28e(b)(5)].
- c. Any surface waters of the state within and below the project to contain taste and odor producing substances at concentrations which interfere with the production of potable water by conventional water treatment processes, impart an unpalatable flavor to edible aquatic or semi-aquatic life or terrestrial wildlife or that result in noticeable odors in the vicinity [KAR 28-16-28e(b)(7)].
- d. The concentration of dissolved oxygen in the Missouri River to be lower than 5.0 mg/L, Kansas Surface Water Quality Standards [KAR 28-16-28e(d)] in table 1g, found in a separate document found at: <https://www.kdheks.gov/tmdl/kswqs.htm>.
- e. The pH in the Missouri River to be below 6.5 or above 8.5 including effects by concentrations of toxic substances. Refer to Surface Water Quality Standards [KAR 28-16-28e(d)] in table 1g, a separate document found at: <https://www.kdheks.gov/tmdl/kswqs.htm>.
- f. Concentrations of toxic substances listed in Tables 1a, 1b, and 1c [KAR 28-16-28e(d)] in the Missouri River to exceed the criteria set out in these tables [KAR 28-16-28e(d)(2)(D) & KAR 28-16-28e(d)(4)(A)].
- g. In the Missouri River harmful concentrations of any substance alone or in combination with other substances causing toxic, carcinogenic, teratogenic, or mutagenic effects in humans [KAR 28-16-28e(d)(3)(C)].
- h. Concentrations of substances that bio-accumulate in the tissues of edible organisms to exceed a cancer risk level of ( $10^{-6}$ ) in persons consuming organisms taken from the Missouri River [KAR 28-16-28e(d)(4)(B)].
- i. **Spills:** Should a spill of fuel or discharge of pollutants occur the local emergency staff should be contacted first by dialing 911. The Kansas Department of Health and Environment shall then be notified immediately: (785) 291-3333 (24 hours a day.) These incidences should also be reported to the National Spill Response Center (1-800-424-8802). *Hazardous materials spills and air releases that meet federal reportable quantities must also be reported to Kansas Division of Emergency Management (800-275-0297).* A Spill Prevention and Response Plan should be prepared including having containment or absorbent materials on-site. This should include reportable quantity limits (see [www.kansas.gov/kdem](http://www.kansas.gov/kdem)). Pursuant to K.A.R. 28-16-28e(b)(1), (5), and (7).

- ii. Discharge of floatable materials by assuring good housekeeping is practiced at the site to minimize the discharge of personal refuse including food containers, packing, and other materials. Appropriate measures shall be taken to capture and/or recover any floatable materials with potential to discharge or that have discharged to waters of the state originating with the permitted project. This includes residue from cleaning of concrete and other structures KAR 28-16-28e(b)(1) and other applicable water quality standards above.**
  - iii. Fuels, Chemicals and Maintenance Areas: All fuels and chemicals necessary to complete the project shall be stored in such a manner that accidental spillage is minimized or can be temporarily contained before reaching the water body. Equipment maintenance areas shall also be located in this manner; pursuant to K.A.R. 28-16-28e(b)(1), (5), and (7).**
- 6) Pursuant to K.S.A. 65: 164 and 165, USACE KCD CW shall avoid or control the discharge of plant nutrients from fertilizer application or restorative vegetative treatment **so that the project does not cause:**
  - a. Any surface waters of the state within and below the project area to have a public health hazard, nuisance condition or impairments of designed uses [KAR 28-16-28e(b)(1)].
  - b. Surface waters of the state within and below the project area to have toxic substances, radioactive isotopes, and infectious microorganisms in concentrations or in combinations that jeopardize the public health or the survival or well-being of livestock, domestic animals, terrestrial wildlife or aquatic or semi-aquatic life [KAR 28-16-28e(b)(2)].
  - c. Any surface waters of the state within and below the project to contain taste and odor producing substances at concentrations which interfere with the production of potable water by conventional water treatment processes, impart an unpalatable flavor to edible aquatic or semi-aquatic life or terrestrial wildlife or that result in noticeable odors in the vicinity [KAR 28-16-28e(b)(7)].
  - d. The introduction of plant nutrients into surface waters designated for primary or secondary contact recreational use shall be controlled to prevent the development of objectionable concentrations of algae or algal by-products or nuisance growths of submersed, floating, or emergent aquatic vegetation in the Missouri River [KAR 28-16-28e(d)((7)(A))].
  - e. The concentration of dissolved oxygen in the Missouri River to be lower than 5.0 mg/L, Kansas Surface Water Quality Standards [KAR 28-16-28e(d)] in table 1g, found in a separate document found at: <https://www.kdheks.gov/tmdl/kswqs.htm>.
  - f. The pH in the Missouri River to be below 6.5 or above 8.5 including effects by concentrations of toxic substances. Refer to Surface Water Quality Standards [KAR 28-16-28e(d)] in table 1g, a separate document found at: <https://www.kdheks.gov/tmdl/kswqs.htm>.

**i. Equipment Staging Areas and Project Closure:** Upon completion of the project, disturbed areas shall be expeditiously stabilized with temporary and permanent vegetation, bio-artificial ground cover or other appropriate non-polluting material. Fertilizer application to establish and maintain vegetation shall be done in a manner that will not contribute to the current nutrient load to any of the surface waters impacted by the project per Condition 6 above.

**ii. The use of permanent native vegetation would avoid fertilizer application where applicable.**

- 7) USACE KCD CW shall avoid or control the discharge of *Escherichia-coli* bacteria from the project sites, especially human sanitation or housekeeping activities, **so that the project does not cause the** *Escherichia-coli* bacteria concentration (colony forming units or CFUs) of the Missouri River to exceed a geometric mean of 262 CFUs- April 1st – October 31st and 2358 CFUs November 1st – March 31st: [KAR 28-16-28e(d)] Table i. <https://www.kdheks.gov/tmdl/kswqs.htm>.

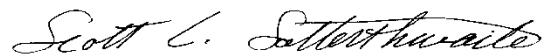
#### **Other Considerations (Not 401 Conditions) for Maintaining and Restoring Water Quality in KS.**

1. **Uncontrolled Construction Activities:** Those activities disturbing one acre or more are subject to the provisions of Kansas Statute Annotated (K.S.A.) 65: 164 and 165 for water pollution control. USACE KCD CW shall obtain an Authorization to Discharge Under Construction Stormwater Runoff Kansas Water Pollution Control General Permit. For more information they shall contact Mr. Larry Hook, P.E., at 785/296-5549, [lhook@kdheks.gov](mailto:lhook@kdheks.gov); Bureau of Water - Industrial Programs (BOW IP) with any questions or visit KDHE's website: [www.kdheks.gov/stormwater](http://www.kdheks.gov/stormwater). A Stormwater Pollution Prevention Plan (SWP2) is required for the issuance of the above described permit and a copy shall be posted on site for inspection and be available for submittal as requested by KDHE BOW IP.
2. This certification does not relieve USACE KCD CW of its responsibility for any discharge into waters of the state. The Kansas Department of Health and Environment retains the option of revoking or revising this certification any time an inappropriate discharge may occur. As provided by K.S.A. 65-171(f), failure to comply with the conditions of this certification may subject the responsible party to fines up to \$10,000 per violation with each day the violation occurs constituting a separate violation.
3. If USACE KCD CW believes complying with the conditions of this water quality certification will be economically unfeasible they can seek a variance. Entities or persons seeking a variance from any of the requirements indicated above shall submit to the secretary, in writing, a request for the variance and shall provide information and data relevant to the variance request for KDHE's review and consideration for approval while adhering to WQS (KAR 28-16-28b to 28-16-28h).

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Finally, questions concerning this certification may be directed to Mr. Scott Satterthwaite, 785-296-5573 or by email to: [Scott.Satterthwaite@ks.gov](mailto:Scott.Satterthwaite@ks.gov).

Sincerely,

A handwritten signature in cursive script that reads "Scott L. Satterthwaite".

Scott L. Satterthwaite, M.S.  
Environmental Specialist, B.E.F.S

EC: KDHE- Hook, NEDO,  
Irwin-Missouri DNR